Filed 2/23/10 T.S. v. Superior Court CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

T.S., Petitioner, v. THE SUPERIOR COURT OF SAN JOAQUIN COUNTY, Respondent; SAN JOAQUIN COUNTY HUMAN SERVICES AGENCY et al., Real Parties in Interest.	C063425 (Super. Ct. No. J04935)

T.S. (petitioner), the mother of the minor, seeks an extraordinary writ to vacate the orders of the juvenile court denying reunification services and setting a hearing pursuant to Welfare and Institutions Code section 366.26 (further section references are to the Welfare and Institutions Code). (Cal. Rules of Court, rule 8.452.) Petitioner contends there was insufficient evidence to support the denial of reunification services. She also claims there was inadequate compliance with

the notice provisions of the Indian Child Welfare Act (ICWA). (25 U.S.C. § 1901 et seq.) We agree with the latter of these contentions insofar as the notice failed to indicate that the minor's maternal relatives, in addition to her paternal relatives, claimed Indian heritage. Accordingly, we shall issue a peremptory writ of mandate directing the juvenile court to vacate its orders and order new notices to issue in compliance with the ICWA, to include information concerning the Indian heritage claimed by petitioner.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2008, a petition was filed by the San Joaquin County Human Services Agency (the Agency) regarding the two-month-old minor, alleging petitioner had a severe developmental disability that had resulted in four other children being removed from her and rendered her incapable of caring for the minor. Petitioner reported that her boyfriend, whose name was Jack, was at the hospital when the minor was born and insisted his name be placed on the birth certificate, but that he was not the biological father. Jack acknowledged this was true. Petitioner named another man as the minor's biological father. The court ruled both men were "alleged" fathers.

Although petitioner initially denied Indian ancestry, she later testified at a hearing regarding another child that she had Cherokee heritage. The maternal aunt also reported there was Cherokee ancestry in the family.

ICWA notices were sent to the Blackfeet and Cherokee tribes, designating Jack as the minor's father and listing his tribal affiliations as "Blackfeet" and Cherokee. The record does not disclose the derivation of the information contained in the ICWA notice concerning Jack's alleged Indian ancestry. The notice stated there was "[n]o information available" as to petitioner's tribe. The record contains return receipts from the tribes and the BIA. According to the dispositional report, no response was received "from either of the tribes."

The allegations in the petition were sustained and the matter was continued for a dispositional hearing.

Two psychological evaluations were performed on petitioner. The first evaluation found her ability to parent was "minimal, if any," that any child in her care would be at risk of neglect and abuse, and that her intellectual and learning disabilities were such that she could not benefit from services. Similarly, the second evaluation found that petitioner was unable to adequately and independently care for children and it did not appear she would be able to benefit from additional services such that she could reunify with the minor. Psychological evaluations conducted 10 years earlier contained similar conclusions regarding petitioner's level of functioning and potential for parenting.

The social worker recommended that services be denied based on petitioner's mental disability (§ 361.5, subd. (b)(2)) and her failure to reunify with her other children. (§ 361.5, subd. (b)(10).)

At the contested dispositional hearing, the social worker testified that petitioner had completed two parenting classes, one of which she participated in voluntarily, and that she was "appropriate" during weekly visits with the minor. Petitioner was also participating in regional center services, which included supervision of visits and modeling appropriate interactions with the minor.

The juvenile court denied petitioner reunification services pursuant to section 361.5, subdivisions (b)(2) and (b)(10), and set the matter for a hearing pursuant to section 366.26 to select and implement a permanent plan for the minor.

DISCUSSION

I

Petitioner argues there was insufficient evidence to support the bypass of reunification services under section 361.5, subdivision (b)(10). However, she does not claim it was error to deny services under section 361.5, subdivision (b)(2)--the other basis relied on by the juvenile court for bypassing services. As there was a valid basis for denying services, it is "unnecessary for us to address the other ground relied on by the juvenile court for denial of services." (*In re D.F.* (2009) 172 Cal.App.4th 538, 546; see also *In re Jasmine C.* (1999) 70 Cal.App.4th 71, 76.)

Petitioner contends the juvenile court may have ruled differently regarding the bypass of services if it was not under the belief that section 361.5, subdivision (b)(10) applied. But

petitioner's mental disability and her inability to utilize services were, in essence, the bases for denying services under both subdivisions. As the juvenile court relied on the same underlying facts to deny services under both subdivisions, there is no reason to believe the court would have granted services had it determined that only one of those subdivisions applied.

II

Petitioner argues there was a failure to comply with the ICWA, in part, because the Agency failed to include information about her tribal affiliation in the notice sent to the tribes. We agree.

In a convoluted argument, petitioner claims that alleged father Jack should have been declared the minor's presumed father and that this error "disconnect[ed] [the minor] from his heritage." She maintains the error was not harmless because, by reporting that no response had been received from "*either* of the tribes" (italics added), the Agency implied it had not received responses from only two of the four tribes that had been sent notice. She then claims this "points to a strong likelihood that, after the [Agency] began to consider [Jack] not a presumed father, it did not seriously consider whether his fatherhood brought [the minor] under ICWA applicability." As we rule in petitioner's favor on the ICWA notice issue on another ground, and as we are unable to follow her logic on this point, we will leave it to her to address this concern upon remand of the matter.

Congress passed the ICWA "to promote the stability and security of Indian tribes and families by establishing minimum standards for removal of Indian children from their families and placement of such children "'in foster or adoptive homes which will reflect the unique values of Indian culture . . . .'" (*In re Levi U.* (2000) 78 Cal.App.4th 191, 195; see also 25 U.S.C. § 1902; *Mississippi Choctaw v. Holyfield* (1989) 490 U.S. 30 [104 L.Ed.2d 29].)

Among the procedural safeguards included in the ICWA is a provision for notice, which states in part: "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." (25 U.S.C. § 1912(a).) The Indian status of a child need not be certain or conclusive to trigger the ICWA's notice requirements. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 471.)

"Notice under the ICWA must . . . contain enough information to constitute meaningful notice." (*In re Karla C.* (2003) 113 Cal.App.4th 166, 175.) Here, the Agency was in possession of information that petitioner claimed she had Cherokee heritage, yet it failed to include this information on the notice to the tribes. The inclusion of the alleged father's claimed tribal affiliations reasonably could have misled the

tribes to consider only his ancestors when investigating the minor's eligibility for membership. Based on the notice provided, the tribes would have had no reason to investigate the minor's Indian heritage on the maternal side.

The Agency does not respond to petitioner's argument that the ICWA notice was faulty because it failed to specify her tribal connection. Instead, it argues, without elaboration, that petitioner was not harmed by any deficiency in the ICWA notice. We do not join in this conclusion, as it is unknown whether a tribe would have determined that the minor is an Indian child had information about petitioner's Indian heritage been included in the notice.

In the present matter, it was imperative that notice reflect there was a claim of Cherokee ancestry on the maternal side, particularly when such notice contained information about the alleged father's claimed Indian heritage. Accordingly, the matter must be remanded for proper ICWA notice.

DISPOSITION

The petition for extraordinary writ is granted as to the claim of failure to provide notice in compliance with the ICWA and denied as to the remaining issue. The matter is remanded with directions to respondent juvenile court to (1) vacate its orders denying petitioner reunification services and scheduling a section 366.26 hearing, and (2) order the Agency to provide ICWA notice to the tribes with information concerning petitioner's tribal affiliation. If, following such notice, a

tribe determines that the minor is an Indian child, or if other information is presented showing the minor is an Indian child as defined by the ICWA, the juvenile court shall conduct a new dispositional hearing in conformity with all the provisions of the ICWA. If, however, the tribes determine that the minor is not an Indian child, or if no response is received indicating the minor is an Indian child, the juvenile court shall reinstate the vacated orders.

HULL, J.

We concur:

SCOTLAND, P. J.

BUTZ, J.